SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1071

L. E. CARPENTER AND MARGARET CARPENTER,
Petitioners,

vs.

TITLE INSURANCE AND TRUST COMPANY,
A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Opinion of Courts Below

The opinion in the District Court of Appeal (R. 20) entitled *Carpenter* v. *Title Insurance and Trust Company* is reported in 71 A. C. A. 783, and the minutes of the California Supreme Court containing the denial of a hearing to petitioners are contained in 27 A. C. No. 16, p. 1 Minutes (R. 38).

II

Jurisdiction

1. The date of the entry of the order of the Supreme Court of California denying petitioners a hearing is dated January 7, 1946, and the date the remittitur was issued by

the District Court of Appeal is Jan. 9, 1946, this is the final judgment.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code sec. 237 b, as amended.

3. The judgment forming the basis of the petition is final both in form and substance and disposes of all elements in the Court below. The judgment is that of the District Court of Appeal of California and its remittitur was issued on January 9, 1946, and is the judgment of the highest state court of right in California.

4. The federal questions were raised in the complaint (R. 14-15) and in the petitions below. Petitioners asserted that the statute enforced against them impaired the obligation of their contract and that they had been denied due process under the 5th and 14th Amendments of the Constitution of the United States.

5. Cases sustaining jurisdiction:

The following cases, among others, sustain the jurisdiction of this Court:

Piqua Branch of Ohio State Bank v. *Knoop*, 16 How. 369;

McCullough v. *Virginia*, 172 U. S. 102, 116, 117;

Detroit United Railway v. *Detroit*, 242 U. S. 238, 249

"When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired."

Determination of the existence of due process of law is the final province of the Supreme Court of the United States.

Davidson v. *New Orleans*, 96 U. S. 97;
Kentucky R., Tax Cases, 115 U. S. 321.

III

Statement of the Case

The statement in the preceding petition under I is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The judgment of the District Court of Appeal, 2nd Appellate District of California, in rendering an opinion against petitioners, the denial of a rehearing by said Court, and the denial of the hearing by the Supreme Court of California, without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and impaired the obligation of their contract by giving validity to the California statute sec. 725 (a) Code of Civil Procedure as against their contractual rights under the trust deed.

V

Summary of Argument

Petitioners entered into a trust deed wherein respondent was the trustee and in which respondent obligated itself to carry out the terms thereof namely to give petitioners written notice of any default entered against them and to proceed with the sale after the trustee recorded the notice of default. The trustee was required to act in good faith

but it never notified petitioners that a notice of default had been recorded nor that it later was withdrawn. The trustee failed and refused to proceed with the sale after the notice of default was recorded as required by the terms of the deed of trust. The lower court decided the issues on demurrer and petitioners did not thus have an opportunity to present their case on its merits. The opinion of the court below exhibits dependence on extraneous matter and does not give proper attention to the federal questions raised by petitioners.

Point 1. The State of California may not pass any laws impairing the obligation of a contract.

Point 2. The contract entered into by the parties can not be altered by state law.

Point 3. The trustee's duties were defined in the trust deed itself and it was bound thereby.

Point 4. The obligation of the contract contained in the terms of the deed of trust was impaired by the construction given sec. 725 (a) of the California Code of Civil Procedure as permitting a foreclosure by judicial action when the trustee had already been committed to a different course under the deed of trust and his own actions.

Point 5. The Supreme Court may determine for itself the extent, construction and validity of the contract.

VI

ARGUMENT

The judgment of the District Court of Appeal and the the Supreme Court of California impaired the obligation of the deed of trust in which respondent was trustee and

petitioners were deprived of their property without due process of law. The contractual rights became fixed at the time the trust deed was executed. The trustee did not carry out its duties thereunder but failed and refused to do so. Either through neglect or conspiracy with the beneficiary the trustee never gave notice to petitioners that the beneficiary had declared a default but instead subsequently returned to the beneficiary the trust deed and acted upon a purported rescission and withdrawal of the notice by the beneficiary. The courts below gave a construction to sec. 725(a) Cal. C. C. P. which overrode the contract and determined that the trustee was not required to proceed with the sale as set out in the trust deed; that lack of notice to petitioners was held to be unimportant although it resulted in petitioners losing their home upon which they had expended large sums of money and further caused them great expense in defending the foreclosure action.

Point 1

The State of California may not pass any laws impairing the obligation of a contract.

(a) The United States Constitution in Article 1, sec. 10, forbids any state to pass any law impairing the obligation of contracts.

(b) A contract is defined to be an agreement in which a party undertakes to do or not to do a particular thing and signifies an agreement of two or more minds, upon sufficient consideration.

Gertrude Crane v. *Louis H. Hahlo*, 258 U. S. 142.

Point 2

The contract entered into by the parties cannot be altered by State law.

(a) A Court cannot make a different contract from that which the parties made for themselves.

Carnegie Steel Co. v. *U. S.*, 240 U. S. 156.
Sun Printing Co. Pub. Assoc. v. *Moore*, 183 U. S. 642.

(b) The Constitution intended to prohibit all such laws impairing the obligation of contracts as interpolate some new terms or conditions foreign to the original agreement.

West River Bridge v. *Dix.* 6 How. (47 U. S.) 507.

(c) Any deviation from the terms of a contract by dispensing with performance of any conditions, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

Green v. *Biddle.*, 8 Wheat. (21 U. S.) 1.
Cleveland P. & A. R. Co. v. *Pennsylvania*, 15 Wall. (82 & U. S.) 300.

(d) The obligation of a contract includes the means of improvement. The ideas of right and remedy are inseparable.

Edwards v. *Kearzey*, 96 U. S. 600.

(e) The relationship of trustee to creator of the trust is a contractual one that cannot be divested by law.

185 La. 894.

Point 3

The Trustee's duties were defined in the Trust Deed itself, and he was bound thereby.

(a) "The rights of a trustee under a Deed of Trust are limited and his powers and obligations are defined by the instrument which creates the trust.

Atkinson v. *Foote*, 44 Cal. App. 149.
Ainsa v. *Mercantile Trust Co.*, 174 Cal. 504.

(b) A trustee is liable for the excess paid to the creditor.

Atkinson v. *Foote*, 44 Cal. App. 149.
Sec. 348 Cal. Code of Civil Procedure.

(c) "In case of default, the creditor and grantor may require the property covered by a Deed of Trust to be sold, and under the terms of the deed it may be the imperative duty of the trustee to sell".

Stockwell v. *Barnum*, 7 Cal. App. 413.
Also,
Herbert Kraft Co. v. *Bryan*, 140 Cal. 73.
Savings and Loan Surety v. *Burnett*, 106 Cal. 514.

(d) The Trustee must proceed with the highest element or good faith to carry out the terms of the trust deed.

Tyler v. *Granger*, 48 Cal. 259.
Cal. Civil Code, Secs. 863, 866, 870.

(e) The Trust Deed contains no provision authorizing trustee to abandon the proceedings for a sale once the notice of default and election to sell has been recorded. Thus the acts of trustee in doing so were unauthorized and it is liable therefor.

Gilbert v. *Penfield*, 124 Cal. 234.
Cal. Civil Code, Sec. B 870.
Blackburn v. *Webb*, 133 Cal. 420.

(f) The Trustee was under the terms of the Trust Deed obligated to carry out its terms strictly and to keep the

trustors informed of any notice filed with them. It is admitted on the state of the record since the question is raised on demurrer that the facts pleaded must be taken as true. The trustee thus is in the embarrassing position of being unfaithful to its promises in the trust deed, and it is not for it to say now that the trustors could not and should not have depended upon the faithful fulfillment of its obligations by contract.

Mayhall v. *Eppinger*, 137 Cal. 5.
McDonald v. *Smoke Creek Live Stock Co.*, 209 Cal. 231.
Flack v. *Boland*, 11 Cal. (2) 103.
Com. Center Realty Co. v. *Superior Court*, 7 Cal. (2) 121.
Atkinson v. *Foote*, 44 Cal. App. 149.

(g) The Trustee is liable without bond on the securities deposited with the State Treasurer of Cal.

Sec. 1044 Cal. C. C. P.

Point 4

The obligation of the contract contained in the terms of the deed of trust was impaired by the construction given Sec. 725(a) of the California Code of Civil Procedure as permitting a foreclosure by judicial action when the trustee had already been committed to a different course under the deed of trust and his own actions.

(a) Sec. 725(a) Cal. C. C. P.:

> "The beneficiary or trustee named in a deed of trust or mortgagee named in a mortgage with power of sale upon real property or any interest therein to secure a debt or other obligation, or if there be a successor or successors in interest of such beneficiary, trustee or mortgagee, then such successor or successors in in-

terest, shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property, except that real property, when the estate therein is more than a leasehold of two years unexpired term, sold under a decree in an action brought pursuant to this section, may be redeemed from such sale any time within three months after the sale in the manner and upon the terms provided by law for the redemption of real property sold under execution; provided, however, that in any case wherein the property shall be sold for a sum less than the judgment sum, in addition to interest thereon and costs of action and expenses of sale, the period for redemption shall be one year."

(b) The court must give effect to the contract as made by the parties themselves.

Carnegie Steel Co. v. *United States,* 240 U. S. 156.

(c) When the parties have not made provisions for dispensation, the terms of the contract must prevail.

Columbus Railway, Power & L. Co. v. *Columbus,* 249 U. S. 399.

(d) A party who charges himself by contract with an obligation must perform it, with exception not involved here.

Sun Printing & Pub. Asso. v. *Moon,* 183 U. S. 642.

The trustee was obligated to inform petitioners of the recording of the notice of default but failed to do so. Despite this the Court held that the 725(a) set aside the provisions of the Trust Deed and could be invoked for a judicial foreclosure.

(e) "The rules of law are settled that, in a suit on a contract the Court must take the contract of the parties as the parties have written it."

Skidmore v. *Tuolumne Co.*, 35 Cal. App. (2) 525.

(f) "As the parties have made their own contract, they are bound by its terms. The court cannot rewrite the clear terms of a lawful contract."

Wells v. *Union Oil of California*, 25 Cal. App. (2) 165.

(g) Sec. 1858 of the Cal. Code of Civil Procedure provides that in the construction of a contract the office of the judge is simply to ascertain its terms and not to insert or omit from it.

Rabbitt v. *Union Indemnity Co.* 140 Cal. App. 575.

(h) Any unauthorized change in a material respect will destroy the contract.

Calif. Savings Bank v. *Wheeler*, 216 Cal. 742.

(I) When the highest court of California upheld the sustaining of the demurrer it in effect construed the California statute as permitting acts done in contravention of the clear terms of the trust deed itself, and thus impaired the obligation of the contract.

State ex Rel Banester v. *Cantley*, 330 Mo. 943.

Point 5

The Supreme Court may determine for itself the extent, construction and validity of the contract.

(a) The Court should determine the meaning and effect of the contractual terms contained in the trust deed.

Ingraham v. *Hanson*, 297 U. S. 378.

(b) The Court has a duty to do so.

Houston, etc. R. Co. v. *Texas,* 177 U. S. 77.

(c) The Supreme Court can independently construe the state legislation.

Larson v. *State of South Dakota,* 278 U. S. 429;
Northwestern University v. *People,* 99 U. S. 323.

(d) The construction put on the statute by the State Court is not conclusive.

Rowenkamp v. *Mercantile Commerce Bank & Trust Co.,* 72 F. (2) 832.

(e) The question may be brought to the Supreme Court as to the violation of the contract clause.

Honeyman v. *Hanan,* 302 U. S. 375.

(f) Granting a continuance in a foreclosure suit on condition of small payments would impair the obligation of the contract.

Soper v. *Ridgmoor County Club,* 275 Mich. 29;
John Hancock M. L. Ins. Co. v. *Schlosser,* 222 Iowa, 447.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by the Court of its supervising powers to right wrong done petitioners by granting a Writ of Certiorari, and thereafter reversing said decision.

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